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No. 90-405

In the Supreme Court of the United States

OCTOBER TERM, 1990

CHARLES A. GOWER, TRUSTEE, PETITIONER

v.

FARMERS HOME ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a bankruptcy trustee who prevails in a preference set aside action (11 U.S.C. 547) against the United States is a "party" eligible for an award under the Equal Access to Justice Act, 28 U.S.C. 2412.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A37) is reported at 899 F.2d 1136. The opinion of the district court (Pet. App. A38-A41) is unreported. The opinion of the bankruptcy court (Pet. App. A42-A45) is reported at 91 Bankr. 627.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1990. A petition for rehearing was denied on June 20, 1990. The petition for a writ of certiorari was filed on September 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During 1981, David Larry Davis received emergency loans from the Farmers Home Administration (FmHA) totalling $985,000. Pet. App. 2. Davis obtained these loans through false statements to the FmHA that misrepresented, among other things, his debts and assets. *Ibid.* In 1983, Davis pleaded guilty to fraud charges based on these false statements, brought under 18 U.S.C. 1014. Pet. 3; Pet. App. A40; Gov't C.A. Br. 3-4.

By October 1981, the FmHA had grown suspicious of Davis and told him that it would not release any more loan money to him or his creditors unless he gave the FmHA a lien interest in his crops and land. Pet. App. A45-A46; Gov't C.A. Br. 4-5. On November 16, 1981, Davis filed a petition in the United States Bankruptcy Court for the Middle District of Georgia, seeking relief under Chapter 7 of the Bankruptcy Code, 11 U.S.C. 701 *et seq.* Pet. App. A2.

2. After petitioner Charles Gower was appointed trustee of the bankruptcy estate, he filed an action against the FmHA in the bankruptcy court. Petitioner sought to set aside as voidable preferences certain payments made by Davis to the FmHA during the ninety-day period before Davis filed for bankruptcy. Pet. App. A2; see 11 U.S.C. 547(b) and (c)(5). Petitioner also sought to have the interests of the FmHA equitably subordinated to those of the other creditors of the estate. Pet. App. A2; see 11 U.S.C. 510(c). The FmHA moved to dismiss the action on grounds of sovereign immunity.

The bankruptcy court denied the FmHA's motion to dismiss. *In re Davis*, 20 Bankr. 519 (Bankr. M.D. Ga. 1982). After a bench trial, the court ruled in

favor of petitioner on his preference and subordination claims. Pet. App. A3.

The district court reversed the bankruptcy court's ruling, holding that petitioner's claim was forfeited under 28 U.S.C. 2514 by virtue of Davis's admitted defrauding of the FmHA. Pet. App. A4.

The court of appeals reversed the district court's decision. *In re Davis*, 785 F.2d 926 (11th Cir. 1986). The court of appeals held that 28 U.S.C. 2514 did not apply in this case because (1) the debtor's fraud cannot be attributed to the trustee when, as in this case, the trustee is suing on behalf of the creditors of the estate; and (2) Section 2514 applies only to actions in the United States Claims Court. 785 F.2d at 927.

On remand, the district court affirmed the bankruptcy court's ruling in favor of the trustee. Pet. App. A4-A5. The district court's ruling on remand was affirmed by the Eleventh Circuit without opinion.

3. On January 4, 1988, petitioner applied in the bankruptcy court for attorney's fees and other expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412. In opposing the application, the government argued that a bankruptcy trustee is not eligible for an EAJA award because a trustee is not a "party" within the meaning of the EAJA, 28 U.S.C. 2412(d)(1)(B) and (2)(B), and that petitioner had not demonstrated that he satisfied the net-worth limitations applicable to litigants seeking EAJA awards, 28 U.S.C. 2412(d)(2)(B). Pet. App. A5, A70.[1]

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[1] The United States also argued that (1) its position was substantially justified (28 U.S.C. 2412(d)(1)(A) and (2)(D)); (2) special circumstances made an award to petitioner unjust (28 U.S.C. 2412(d)(1)(A)); and (3) petitioner's documentation of the time allegedly expended for representation

The bankruptcy court rejected the government's arguments and awarded petitioner $112,638.75 in attorney's fees and $631.56 in other expenses. Pet. App. A5-A6, A82-A84. The court held that a trustee in bankruptcy is a "party" for purposes of EAJA. *Id.* at A55-A56. The court observed that the definition of "party" in EAJA includes the terms "association" and "organization" and that "organization" is broadly defined in *Black's Law Dictionary* to include an "estate." Pet. App. A55. The court reasoned that a bankruptcy trustee is an "organization" within the meaning of EAJA because the trustee represents the bankruptcy estate. *Id.* at A56. The court further held that petitioner met the net-worth requirement for "organization[s]" set forth in the EAJA "since the Chapter 7 estate was insolvent." *Ibid.*

The district court affirmed the bankruptcy court's ruling. Pet. App. A40-A41.

4. The Eleventh Circuit vacated the judgments of the district court and the bankruptcy court granting petitioner an award under EAJA. The vacatur was based on the court of appeals' holding that the bankruptcy court lacked jurisdiction to entertain petitioner's EAJA application. Pet. App. A8-A24.[2]

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was inadequate (28 U.S.C. 2412(d)(1)(B)). Pet. App. A5, A70.

[2] Because petitioner does not challenge this holding (Pet. 8), its basis will be only briefly summarized here: The court of appeals determined that EAJA awards may be made only by Article III courts. Pet. App. A8-A14. On this basis, the court concluded that, because a bankruptcy court is not an Article III court, it may entertain an EAJA application in only two ways: (1) by submitting for the district court's consideration a non-binding recommendation regarding the ap-

Anticipating that petitioner would seek to renew his application in the district court (Pet. App. A25), the court of appeals went on to address the question whether petitioner is a "party" within the meaning of EAJA.

The court of appeals concluded that petitioner is not a "party" for purposes of EAJA, 28 U.S.C. 2412(d)(2)(B). Pet. App. A25-A37. The court rejected petitioner's argument that as the representative of the unsecured creditors of the estate he qualified as an "organization" within the meaning of the EAJA provision that defines "party." *Id.* at A26-A31. The court acknowledged that *Black's Law Dictionary* broadly defines "organization" to include an "estate," but the court determined that to adopt such a "sweeping" definition of "organization" in interpreting EAJA would violate the principle that waivers of sovereign immunity are to be narrowly construed. Pet. App. A29-A30. The court reasoned that

> the conception of an "organization" as "a group of people that has a more or less constant membership, a body of officers, [and] a *purpose*," *see Webster's Third New International Dictionary* 1590 (1976) (emphasis added), more probably captures Congress's intent in drafting the EAJA * * *.

Id. at A30-A31. The court concluded that a bankruptcy estate does not fit within this conception. The "members" of an estate, the court noted, do have an "abstract common purpose of recovering what is owed to them," but in reality this purpose is often

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plication; or (2) by considering the application after it had been referred by the district court with the parties' consent. *Id.* at A14-A24. Neither of these situations obtained here. *Ibid.*

overshadowed by "violently competing individual-interests." *Id.* at A32.[3] The court further distinguished the bankruptcy estate from the common conception of an organization based on the inherently transient nature of the estate. *Id.* at A33. The court observed that in this case the estate "did not even exist prior to Davis's bankruptcy filing, and thus did not exist during the time FmHA was engaging in the conduct which was the subject matter of the lawsuit for which attorney's fees are now sought." *Ibid.* For these reasons, the court of appeals held, "a bankruptcy trustee is not a 'party' eligible to seek fees under the EAJA." *Id.* at A37.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any court of appeals.

1. Congress enacted the Equal Access to Justice Act (EAJA) for "the specific purpose [of] * * * eliminat[ing] for the average person the financial disincentive to challenge unreasonable governmental actions." *Commissioner, INS* v. *Jean*, 110 S. Ct. 2316, 2321 (1990) (citing *Sullivan* v. *Hudson*, 109 S. Ct. 2248, 2253 (1989)). To this end, Congress limited the categories of "part[ies]" eligible for EAJA awards to individuals and certain business entities with limited financial resources:

> "[P]arty" means (i) an individual whose net worth did not exceed $2,000,000 at the time the

[3] The court of appeals quoted this Court's observation that "historically one of the prime purposes of the bankruptcy law has been * * * to protect the creditors from one another." Pet. App. A32 (quoting *Young* v. *Higbee Co.*, 324 U.S. 204, 210 (1945)).

> civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed * * *.

28 U.S.C. 2412(d)(2)(B).[4] In specifying the categories of eligible "[p]art[ies]," Congress did not include either bankruptcy trustees or bankruptcy estates. The court of appeals correctly concluded from this omission that neither entity is a "party" for purposes of EAJA.

a. Petitioner renews his contention (Pet. 10-12) that a bankruptcy trustee is an "organization" within the meaning of EAJA, 28 U.S.C. 2412(d)(2)(B). This contention is flawed, for it ignores the unique nature of the bankruptcy estate and the resulting practice of Congress to be specific when it intends a statute to apply to trustees in bankruptcy.

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[4] See also congressional Findings and Purpose, Equal Access to Justice Act, Pub. L. No. 96-481, § 202, 94 Stat. 2325, *reproduced in* Note following 5 U.S.C. 504:

> (a) The Congress finds that *certain individuals, partnerships, corporations, and labor and other organizations* may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings. * * *
>
> (c) It is the purpose of this title—
>
> (1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing *in specified situations* an award of attorney fees, and other costs against the United States. * * *

(Emphasis added.)

As the court of appeals recognized (Pet. App. A31-A35), to equate a bankruptcy trustee to an organization, one must overlook the essential features of the bankruptcy estate. First, the trustee does not simply represent the estate. In addition, "he owes a complex set of obligations and fiduciary duties to the court, the debtor, the shareholders (in the case of a bankrupt corporation), and * * * the creditors." *Id.* at A28 n.15 (citing, *inter alia*, *Commodity Futures Trading Comm'n* v. *Weintraub*, 471 U.S. 343, 354-355 (1985)).[5] Second, as the court of appeals observed (Pet. App. A34), the estate is a "far cry" from the common conception of an organization. In contrast to the voluntary arrangements among individuals by which organizations coalesce and are run, the purpose and composition of the bankruptcy estate are defined by statute, see, *e.g.*, 11 U.S.C. 541-559, and the administration of the estate is controlled by the trustee under the court's supervision, see, *e.g.*, 11 U.S.C. 361-366. See also 11 U.S.C. 701-718.[6] Finally, the creditors of a bankruptcy estate

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[5] The multifarious nature of the bankruptcy trustee's role is reflected in petitioner's arguments to this Court. Petitioner depicts himself as a representative of the creditors for the purpose of arguing that he is an "organization," Pet. 11-12; as a representative of the estate for the purpose of arguing that he satisfies EAJA's net-worth limitations, Pet. 12-14; and as a representative of the debtor for the purpose of arguing that the court of appeals' holding undermines the purposes of EAJA, Pet. 18-20.

[6] Bankruptcy estates also differ from what petitioner calls (Pet. 10) "*the* archetypal form of organization," the corporation. For example, bankruptcy estates are inherently limited in duration, see, *e.g.*, 11 U.S.C. 726 and 727, whereas corporations may exist indefinitely. See Pet. App. A31-A33; see also W. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* §§ 4080-4082 (rev. perm. ed. 1982).

have little in common with members of voluntary organizations. Their relationship both to the estate and to each other, rather than being characterized by commonality of purpose, is dominantly an adversary one. Indeed, one of the "prime purposes" of the bankruptcy laws, which define these relationships in detail, is "to protect the creditors from one another." *Young* v. *Higbee Co.*, 324 U.S. 204, 210 (1945); see also 11 U.S.C. 501-510. In sum, a bankruptcy estate is *sui generis.*

Congress has consistently demonstrated its awareness of the unique nature of the bankruptcy estate. In numerous statutes, Congress has expressly included bankruptcy trustees when specifying the entities subject to the statute.[7] Moreover, in many of

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[7] See, *e.g.*, Investment Company Act of 1940, 15 U.S.C. 80a-2(a)(8) ("Company means a corporation, a partnership, an association, a joint-stock company, a trust, a fund, or any organized group of persons whether incorporated or not; or any receiver, *trustee in a case under title 11* or similar official or any liquidating agent for any of the foregoing, in his capacity as such.") (emphasis added); National Labor Relations Act of 1947, 29 U.S.C. 152(1) ("The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, *trustees in cases under title 11*, or receivers.") (emphasis added); Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 402(d) (" 'Person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, *trustees in cases under title 11*, or receivers.") (emphasis added); Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e(a) ("The term 'person' includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, *trustees in cases under title 11*, or re-

these same provisions, Congress has also explicitly included types of entities—for example, "trustees," "fiduciaries," "associations," and "unincorporated organizations"—that might otherwise be interpreted implicitly to include bankruptcy trustees or bankruptcy estates.[8] These provisions strongly suggest

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ceivers.") (emphasis added); Fair Housing Act of 1968, 42 U.S.C. 3602(d) (" 'Person' includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, *trustees in cases under title 11*, receivers, and fiduciaries.") (emphasis added); Federal Public Transportation Act of 1978, 49 U.S.C. App. 1615(a)(5) ("For purposes of this section [prohibiting discrimination in certain federally funded transportation projects], the term 'person' includes one or more governmental agencies, political subdivisions, authorities, partnerships, associations, corporations, legal representatives, mutual companies, trusts, unincorporated organizations, trustees, *trustees in bankruptcy*, or receivers.") (emphasis added); Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No. 101-381, § 2676(11), 104 Stat. 576 ("The term 'person' includes one or more individuals, governments (including the Federal Government and the governments of the States), governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, receivers, trustees, and *trustees in cases under title 11*, United States Code.") (emphasis added).

[8] See note 7, *supra*. See also, *e.g.*, Federal Employees Retirement System Act of 1986, 5 U.S.C. 8471(4) ("The term 'person' means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, *trust, estate, unincorporated organization, association*, or labor organization.") (emphasis added); United States Synthetic Fuels Corporation Act of 1980, 42 U.S.C. 8702(12) ("The term 'person' means any individual, company, cooperative, partnership, corporation, *association*, consortium, *unincorporated organization, trust, estate*, or any entity organized for a common business purpose.").

that Congress likewise in EAJA would have expressly included bankruptcy trustees when defining "party" had it intended them to be eligible for EAJA awards.

b. That Congress had no such intention is further evidenced by the difficulty of applying EAJA's net-worth limitations to trustees in bankruptcy. Under EAJA, to be a "party" the net worth of an "organization" must not exceed $7 million. See 28 U.S.C. 2412(d)(2)(B)(ii).

As the court of appeals recognized (Pet. App. A34 n.18), if a bankruptcy trustee were found to be an "organization," uncertainty would arise whether the net-worth limitation applies to the resources of the estate or to those of the creditors of the estate. Doubt on this point stems from the multifarious role of the trustee. In general, the trustee represents the estate, 11 U.S.C. 323(a), but in many cases, including the underlying action for which an award was sought here, the trustee is also " 'standing in the shoes' of the creditors." Pet. App. A31 (quoting *Koch Refining* v. *Farmers Union Central Exchange, Inc.*, 831 F.2d 1339, 1343 (7th Cir. 1987), cert. denied, 485 U.S. 906 (1988)).

Since the estate is always insolvent, consideration of its net worth will never trigger EAJA's net-worth limitation.[9] As a result, awards to trustees would in many cases benefit creditors who would not themselves satisfy the net-worth limitation[10]—contrary to

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[9] This was the approach taken by the bankruptcy court below; the court held that petitioner satisfied EAJA's net-worth limitation "since the Chapter 7 estate was insolvent." Pet. App. A56.

[10] In this case, for example, creditors of the estate included Ford Motor Credit Company, the General Motors Acceptance Corp., and the John Deere Credit Corp. Pet. App. A35 n.18. Petitioner has never disputed the government's contention that

Congress's purpose to target EAJA awards to small businesses.[11]

On the other hand, basing an EAJA award to a trustee on the net worth of the creditors would be difficult to square with the Bankruptcy Code in cases where only some of the creditors satisfy the net-worth limitation. Any award to the trustee under EAJA would become property of the estate, not its creditors. See 11 U.S.C. 323 and 541. As such, it would ordinarily be distributed, along with the other assets, to each creditor in proportion to the amount owed to the creditor. 11 U.S.C. 726(b); see also *Young*, 324 U.S. at 210. Thus, it appears that the court making an EAJA award to the trustee could not, consistent with the Code, restrict the benefit of the award to those creditors who satisfy EAJA's net-worth limitation.

In sum, EAJA's net-worth limitation cannot easily be applied to trustees in bankruptcy in a manner that is at once consistent with its purpose and with the scheme of the Bankruptcy Code. This tension further suggests that Congress did not intend bankruptcy trustees to be eligible for EAJA awards.

c. Any doubt as to Congress's intent must be resolved against an extension of EAJA to cover bankruptcy trustees. EAJA is a waiver of sovereign immunity. *Haitian Refugee Center* v. *Meese*, 791 F.2d 1489 (11th Cir. 1986); *Clifton* v. *Heckler*, 755 F.2d

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these creditors would have difficulty showing that they meet EAJA's net-worth limitation. Gov't C.A. Br. 21-22.

[11] See S. Rep. No. 586, 98th Cong., 2d Sess. 6, 18 and 20 (1984); H.R. Rep. No. 1418, 96th Cong., 2d Sess. 15 (1980); S. Rep. No. 253, 96th Cong., 1st Sess. 17 (1979); see also *Jean*, 110 S. Ct. at 2321-2322 & 2322 nn.11-14.

1138 (5th Cir. 1985). As such, it must be narrowly construed. See *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986); *United States* v. *Sherwood*, 312 U.S. 584 (1941). The court of appeals properly interpreted EAJA in a manner that is consistent with this principle. Pet. App. A30, A36.

d. At the same time, the court of appeals recognized that interpretation of EAJA must also be guided by its "beneficial purposes." Pet. App. A36; see also *Sullivan* v. *Hudson*, 109 S. Ct. 2248, 2257 (1989). Petitioner contends (Pet. 17-21) that these purposes are undermined by the court of appeals' holding that a trustee in bankruptcy is not a "party" eligible for an EAJA award. This contention is incorrect.

Petitioner's contention is based on his mistaken assertion (Pet. 17) that Congress enacted EAJA to benefit any "private citizen" with a meritorious claim against the government. On the contrary, Congress intended EAJA to benefit only "certain individuals, partnerships, corporations and labor and other organizations" (S. Rep. No. 253, 96th Cong., 1st Sess. 1 (1979)) "for whom cost may be a deterrent to redressing their grievances" (S. Rep. No. 586, 98th Cong., 2d Sess. 6 (1984)). See also *Jean*, 110 S. Ct. at 2321. This focus is manifest in Congress's limiting the "part[ies]" that are eligible for awards under EAJA. 28 U.S.C. 2412(d)(2)(B); see also congressional Findings and Purpose, quoted in relevant part note 4, *supra*.

In particular, the hypothetical situation described in the petition (Pet. 19-20) does not impugn the court of appeals' holding. Petitioner correctly notes (Pet. 19) that under the court's holding a small business person who brings a meritorious claim against an agency might qualify for an EAJA award, but if

that person files for bankruptcy before bringing any claim against the agency, a trustee who brings the claim could not recover an EAJA award. Petitioner is mistaken, however, to assert that this result would frustrate Congress's intent to target EAJA awards to small business persons. For even if, contrary to the court of appeals' holding, the trustee in petitioner's scenario *were* eligible for an EAJA award, that award would not benefit the business person; it would benefit the creditors of the estate. Thus, the business person in this scenario is deprived of an award not by the court of appeals' holding but by the intervening bankruptcy.[12]

The same analysis applies to the modified scenario posited by petitioner (Pet. 20), in which an agency maliciously brings about a bankruptcy. Rather than design EAJA to ensure that every instance of unreasonable governmental conduct was challenged, Con-

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[12] Moreover, while the business person and the trustee may have the same claim, they have different incentives for bringing the claim. The trustee is obligated to maximize the assets of the estate. See *In re Xonics, Inc.*, 813 F.2d 127, 131 (7th Cir. 1987); see also *Young* v. *Higbee Co.*, 324 U.S. 204, 210 (1945). A private claimant will weigh financial considerations, but the claimant may also take into account concerns that the trustee could not consider—for example, the personal inconvenience caused by a lawsuit. Further, a private claimant may have greater difficulty obtaining counsel than would a trustee. Counsel assisting the trustee have priority over creditors in recovering their costs and fees from the estate. 11 U.S.C. 330(a), 503(b)(2), 507(a)(1); see also, *e.g.*, *Meddaugh* v. *Wilson*, 151 U.S. 333, 342-343 (1894). Counsel for a private claimant, in contrast, usually do not have resort to a a *res*. Cf. *Sullivan*, 109 S. Ct. at 2256. In light of these differences, Congress reasonably could have concluded that trustees should not receive awards for bringing claims that the debtor could have brought if the debtor had not filed for bankruptcy.

gress designed EAJA to benefit those litigants with meritorious claims who were least able to afford litigation.[13]

e. Likewise without merit is petitioner's contention (Pet. 10-17) that the court of appeals' holding conflicts with the Bankruptcy Code.

Contrary to petitioner's assertion (Pet. 10-12), the court of appeals did not conclude that bankruptcy estates and business organizations are wholly dissimilar. The court acknowledged that a bankruptcy estate falls within the broad definition of "organization" set forth in *Black's Law Dictionary*. Pet. App. A29 (quoting *Black's Law Dictionary* 991 (5th ed. 1979)). The court also recognized that "a bankruptcy trustee represents, in part, a group of creditors who share the common interest and purpose of recovering the maximum return on the debts owed to them." Pet. App. A31. The court concluded, however, that Congress did not intend in EAJA to adopt the "sweeping scope for the term 'organization'" urged by petitioner. Pet. App. A30. We have shown that the court's conclusion is correct and reflects an accurate understanding of the functioning of the bankruptcy estate.[14]

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[13] For example, Congress expressly excluded from the scope of EAJA recovery for civil actions "sounding in tort," 28 U.S.C. 2412(d)(1)(A), based on its judgment that existing legal remedies for such cases were adequate, see H.R. Rep. No. 1418, *supra*, at 18.

[14] There is no basis in the opinion below for petitioner's assertion that the court of appeals "would deny EAJA fees to a Chapter 7 trustee, while allowing them to a Chapter 7 debtor." Pet. 15. To the contrary, the court's reasoning suggests that its holding would not have been different if a debtor in possession rather than a trustee had brought the underlying action and then applied for an EAJA award. This is indicated

2. The decision below does not conflict with that of any other court of appeals. As the court below recognized (Pet. App. A26-A28), no other court of appeals has addressed the issue whether a trustee in bankruptcy is a "party" within the meaning of EAJA, 28 U.S.C. 2412(d)(2)(B).[15] The issue would benefit from "further study" in the lower courts "before it is addressed by this Court," *McCray* v. *New York*, 461 U.S. 961, 963 (1983) (Stevens, J.)—if, indeed, there will ever be a need for this Court to address it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1990

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by the court's focus on whether the bankruptcy estate fit within the concept of "organization" Congress had in mind when drafting EAJA. Pet. App. A29-A34, A37; see also 11 U.S.C. 1107(a) (with limited exceptions, debtor in possession has same rights, powers, and duties as a trustee); see also Bankr. R. 9001(10) (" 'Trustee' includes a debtor in possession in a chapter 11 case.").

[15] None of the Fifth Circuit decisions cited by petitioner discusses the issue. Pet. 21-23 (citing *In re Lee*, 812 F.2d 253 (1987); *Moody* v. *United States*, 783 F.2d 1244 (1986); *In re Esmond*, 752 F.2d 1106 (1985)).

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